Supreme Court, U.S.
FILED
JUN 24 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 09-399

IN THE

Supreme Court of the United States

GARY A. MOORE, M.D.,

PETITIONER

V.

ADVENTIST HEALTH SYSTEM/
GEORGIA INC., ET. AL,

RESPONDENTS

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Question for Review

The Health Care Quality Improvements Act ("HCQIA") provides *limited* immunity to physicians and hospitals engaged in the peer review of other physicians. Yet, every court that has ever reviewed an HCQIA case has granted summary judgment in favor of the peer reviewers.

Courts have uniformly held that the HCQIA provides immunity where the evidence, at the summary judgment stage, shows that the reviewers "reasonably ... concluded that their actions would restrict incompetent behavior or would protect patients." *See* Appendix B, Order at 78. In other words, "the real issue is the sufficiency of the basis for [the peer reviewer's] actions." *Id.* A review of the hundred or so published HCQIA opinions reveals that no court has ever systematically examined a physician's evidence in a light most favorable to the non-movant physician, to assess the reasonableness of a peer reviewer's decision. Although courts pay lip service to the "most favorable light" standard, if there is "any evidence" to support the peer reviewer's decision, then summary judgment is granted to the peer reviewer.

As counsel for Respondents *conceded* at oral argument, the summary judgment standard under the HCQIA, and the one used in this case, was whether there existed *any evidence* to support the peer reviewers' decision.

The "any evidence" standard at the summary judgment stage wherein the court focuses on the movant's evidence cannot be reconciled with the traditional summary judgment standard wherein the court must focus on the non-movant's evidence viewing it in a light most favorable to the non-movant. Because the court in this case applied an "any evidence" standard, summary judgment was improperly granted to Respondents.

Thus, the following question is presented for review:

DOES THE STANDARD OF REVIEW AT THE SUMMARY JUDGMENT STAGE IN A CASE INVOLVING THE HEALTH CARE QUALITY IMPROVEMENTS ACT WHEREIN EVERY COURT GRANTS SUMMARY JUDGMENT IF THERE IS *"ANY EVIDENCE"* TO SUPPORT THE PEER REVIEWER'S DECISION, SUPERSEDE AND REPLACE THIS COURT'S LONG HELD SUMMARY JUDGMENT STANDARD REQUIRING COURTS TO "VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE NON-MOVANT?"

Corporate Disclosure Statement

Pursuant to United States Supreme Court Rules 14.1(b) and 29.6, Petitioner hereby states that a list of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit is set forth in the caption to this case. Set forth below is a list of all corporations, including any parent corporation, for whom disclosure is required by the above-referenced rules:"

A[redacted] H[redacted] S[redacted] S[redacted] H[redacted] Corporation, parent corporation of A[redacted] H[redacted] S[redacted]/G[redacted], Inc. d/b/a G[redacted] Hospital, Respondent

This 23rd day of June, 2008.

s/David F. Guldenschuh
David F. Guldenschuh
Ga. Bar No. 315175
Counsel for Petitioner

Table of Contents

Question for Review i
Corporate Disclosure Statement iii
Table of Contents iv
Table of Authorities v
Opinion Below 1
Statement of Jurisdiction 1
Federal Statute At Issue 2
Statement of Facts 4
Legal Argument and Analysis 9
A. The HCQIA "Any Evidence" Standard Is Totally Contrary to Long Standing Decisions of This Court. 10
B. The District Court Incorrectly Applied An "Any Evidence" Standard of Review In Granting Summary Judgment to Respondents In This Case 16
C. Unlike the HCQIA "Any Evidence" Standard, Other Federal Statutes Having Higher Substantive Evidentiary Burdens Still Allow For Reviewing the Evidence In a Light Most Favorable to the Non-Movant. 21
D. There Are Compelling and Important Reasons For This Court to Grant the Petition for Writ of *Certiorari* 24
Conclusion 27
Certificate of Compliance 29
Appendix A: Eleventh Circuit Per Curiam Order
Appendix B: District Court Order

Table of Authorities

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) 10

Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 10, 22

Angelico v. Lehigh Valley Hosp., Inc., 543 U.S. 814, 125 S.Ct. 67, 160 L.Ed.2d 19 (*cert. denied* Oct. 4, 2004) 25

Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) 10- 13

Brader v. Allegheny General Hospital, 167 F.3d 832 (3d Cir. 1999) 14, 17

Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324 (10th Cir. 1996) 9

Bryan v. James E. Holmes Reg. Med. Ctr., 33 F.3d 1318 (11th Cir. 1994) 10, 13, 17

Cowett v. TCH-Pediatrics, Inc. 2006 WL 2846282 (Ohio 2006), *cert. denied*, ___ U.S. ___, 128 S.Ct. 115, 169 L.Ed.2d 244 (2007) 25

Fed. Trade Comm'n v. Am. Tobacco Co., 274 U.S. 543 (1927) 25

Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439 (9th Cir. 1994) 14

Gabaldoni v. Washington County Hosp Ass'n, 250 F.3d 255 (4th Cir 2001) 15

Imperial v. Suburban Hosp. Ass'n, Inc. 37 F.3d 1026 (4th Cir. 1994) 14

Islami v. Covenant Medical Center, Inc., 822 F.Supp. 1361 (N.D.Iowa 1992) 9

Joshi v. St. Luke's Presbyterian-Episcopalian Hospital, Inc., 142 S.W.3d 862 (Mo. App. 2004), *cert. denied*, 544 U.S. 922, 125 S.Ct. 1646, 161 L.Ed.2d 479 (2005) 25

Lee v. Trinity Lutheran Hospital, 408 F.3d 1064 (8th Cir. 2004) 15, 17

Manzetti v. Mercy Hosp. of Pittsburgh, 565 Pa. 461, 776 A.2d 938 (2001) 15

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 111 S.Ct. 2419, _ L.Ed.2d _ (1991) 22

Mathews v .Lancaster General Hosp., 87 F.3d 625 (3d Cir. 1996) 15

Matsushita Electric Industrial Company v. Zenith Radio Corporation, 477 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 10

McLeay v. Bergan Mercy Health Sys. Corp., 714 N.W.2d 7 (Neb. 2006) 15

Meyers v. Logan Mem'l Hosp., 82 F.Supp.2d 707 (W.D. Ky. 2000), *aff'd*, 341 F.3d 461 (6th Cir. 2003) 14

M[redacted] v. A[redacted] H[redacted] S[redacted], et. al, 311 Fed.Appx. 209 (11th Cir. 2009). 1

Patrick v. Floyd Medical Center, 255 Ga. App. 435, 565 S.E.2d 491 (2002) 13

Peyton v. Johnson Med. Ctr., 101 S.W.3d 76 (Tenn. Ct. App. 2002) 14

Poliner v. Texas Health Systems, 537 F.3d 368 (5th Cir. 2008), *cert. denied*, ___ U.S. ___ 129 S.Ct. 1002, 173 L.Ed.2d 315 (2009) 25

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) 10

Sugarbaker v. SSM Health Care 190 F.3d 905 (8th Cir. 1999) 14

United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)..... 10
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490-91 (1951) 25

Statutes

28 U.S.C. § 1254..... 1
28 U.S.C. § 1332..... 8
HCQIA, 42 U.S.C. § 11111 *et seq.* .....*passim*

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The Semmelweis Society International, http:// www.semmelweis.org and http://www. Semmelweis Society.net (last visited May 23, 2007).....26
American Association of Physicians & Surgeons, Inc., http:// www.aapsonline.org (last visited May 23, 2007).....26
The Center for Peer Review Related Justice, http://www.peerreview.org (last visited May 23, 2007).....26

Opinion Below

The opinion of the United State District Court (Appendix B) was filed under seal below. The opinion of the Eleventh Circuit Court of Appeals can be found at 311 Fed.Appx. 209, 2009 WL 146709 (C.A.11 (Ga.)).

Statement of Jurisdiction

This case involves an appeal from a decision of the United States Court of Appeals for the Eleventh Circuit rendered January 23, 2009 (Appendix A), which affirmed the decision below on the basis of opinion of the United States District Court for the Northern District of Georgia, Rome Division, entered May 27, 2008, (Appendix B). On March 26, 2009, the Eleventh Circuit denied Petitioner's motion for rehearing and for rehearing *en banc*.

This case is subject to the jurisdiction of this court on petition for writ of certiorari from a federal court of appeals pursuant to 28 U.S.C. § 1254.

Federal Statute At Issue

The Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11111 et seq.

The following provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11111 *et seq.* are involved in this case:

§ 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable

effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) . . . . .

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as--

. . . . .

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

Statement of Facts

Petitioner was the Director of the Respondent hospital's emergency services department for 13 years.[1] During the summer of 2005, Petitioner treated two elderly patients in the ER. One patient suffered from congenital heart disease; the other suffered painful terminal metastatic colon cancer.

When the heart patient presented, Petitioner ordered specific cardiac tests to assess her condition. V.4, R.106: Ex. 15.[2] Although he urged the patient to

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[1] Petitioner is a Board certified physician in both emergency medicine and family practice medicine. V.3, R.127: Amended Affidavit of Dr. G[redacted] M[redacted]e, ¶ 1. He is a Fellow of both the College of Emergency Physicians and the College of Family Physicians. Id. He was appointed Director of G[redacted] Hospital's emergency services in 1992 after some eleven years of experience as an emergency room physician elsewhere. Id. During his 13 year tenure at G[redacted] Hospital, Petitioner treated some 60,000 patients and was peer reviewed on approximately 25,000 of those cases. Id. ¶ 3. With one disputed exception, the two cases at issue in this suit were the only two cases which ever gave rise to a claim of serious deficiency. Id.

[2] Citations to the record are as follows: "V" refers to the Volume of the Record as set forth on the Docket Sheet. "R" refers to the individual docket number assigned to each pleading filed in the District Court and so noted on the Docket Sheet. "Ex" refers to the Exhibit number Respondents assigned to each of the documents in the administrative record, an index of which was filed under the title "Evidentiary Submissions in Support of Defendants' Motion for Partial Summary Judgment." V.4, R.106. Exhibit numbers will not conform to the separate "#" assigned to the documents as listed on the Docket Sheet at R. 106.

remain in the ER for further testing, she insisted on going home to her invalid husband. V.4, R.106: Ex. 97 at 7, 19, 21. Three days later, she suffered a heart attack and died. V.4, R.106: Ex. 85 at 184 & Ex. 16.

The cancer patient presented to the ER some three weeks later screaming in pain. V.4, R.106: Ex. 85 at 227. Petitioner sedated the patient for her pain. V.4, R.106: Ex. 85 at 233; V.4, R.106: Ex. 17. Pursuant to her husband's request, Petitioner provided comfort care as she slowly declined. V.4, R.106: Ex. 85 at 173. Subsequently, after the patient's pain came under control, she requested that all life-saving measures be taken to address her medical issues. V.4, R.106: Ex. 85 at 176-77. Petitioner thus ordered that she be admitted to ICU for aggressive care. Id. Upon arriving in ICU, the patient's condition became unstable and she passed away.

Shortly thereafter, these two cases came to the attention of the Medical Executive Committee (MEC). On August 24, 2005, the MEC convened to review the two cases. Due to the poor copying of the patient charts, the MEC members were unaware of the reasons for the perceived delayed treatment of the cancer patient, a crucial fact underlying their criticism of Petitioner. V.4, R.106: Ex. 84 at 161-62. In addition, the charts were incomplete.

The MEC reviewed the charts, and without further investigation, determined that Petitioner should be suspended. Prior to announcing their

decision, they had the charts assessed by three other ER physicians and one of the patient's treating physicians. V.4, R.106: Ex. 18 ;V.4, R.106: Ex. 84 at 39, 208. Although the ER physicians opined that Petitioner's care was appropriate, the MEC chose to ignore their input. V.4, R.106: Exs. 19 & 20.

The MEC re-convened on August 29, 2005. Even though five days had passed since their initial review, they chose not to interview Petitioner. Without any further investigation and based upon their review of "clearly incomplete" charts, the MEC voted to suspend Petitioner's privileges and report his suspension to the National Practitioner's Data Bank (NPDB). V.4, R.106: Ex. 21.

Hospital bylaws provided that upon summary suspension, Petitioner was entitled to a due process hearing before a panel of physicians appointed by the Hospital. V.4, R.106: Ex. 14. Four senior, well-respected physicians, each with partners on the MEC or Hospital Board or both, were appointed to hear the case. Senior Judge R[redacted] P. M[redacted] was retained to serve as their counsel and moderator of the hearing.

On December 13, 2005, after three evenings of testimony, the Due Process Hearing Panel rendered its decision in this matter. To Respondents' great surprise, the Panel ruled in favor of Petitioner finding as follows:

> **The Medical Executive Committee acted in an arbitrary manner** by not allowing Dr. M[redacted] an interview in a

timely fashion prior to issuing the summary suspension of his privileges.

While the Hearing Committee recognizes the MEC's concerns for patient safety in making their decision for the summary suspension of August 29, 2005, we feel that **the decision was made using incomplete information.** The medical records of the two cases in question were **clearly incomplete and lacking information important** to their decision.

The members of the Hearing Committee found it very disturbing that a member of the Medical Staff would not be afforded the opportunity to have an interview prior to the MEC taking actions of this severity. We believe **the truth could have been best served with a timely interview with Dr. M[redacted].**

. . .

The Committee recommends the summary suspension be lifted immediately and Dr. M[redacted] be granted his full complement of clinical privileges at G[redacted] Hospital.

V.4, R.106: Ex. 102.

Notwithstanding the Panel's decision, the Hospital Board met on January 5, 2006, and voted to reject the Panel's efforts entirely and to uphold the summary suspension of Petitioner. V.4, R.106: Ex. 109.

On August 24, 2006, Petitioner filed suit seeking damages, declaratory and equitable relief against Respondents for malicious and bad faith peer review, breach of duty, tortious interference with business relations, defamation, conspiracy and denial of due process. (Vol. 1, R. 1). Jurisdiction was based both on diversity of citizenship pursuant to 28 U.S.C. § 1332 and violation of federal law due to the alleged malicious peer review of Respondents in violation of the HCQIA. 28 U.S.C. § 1331.

After limited discovery per Court Order (V. 3, R. 56-58). Respondents filed a Motion for Partial Summary Judgment on November 29, 2007. (V. 2, R. 100; V. 3, R. 104-05; V.4, R. 106). Seven days after briefing closed, the District Court entered its Order, not only granting Respondents' motion for *partial* summary judgment, but dismissing the case entirely. (V.3, R.146). Petitioner timely filed his Notice of Appeal on June 25, 2008. (V.2, R.148).

The Eleventh Circuit then affirmed the lower court on the basis of the District Court's opinion (Appendix A). This appeal followed.

Legal Argument and Analysis

Although the HCQIA was intended to provide *limited* immunity to peer reviewers, courts have developed a standard of review at the summary judgment stage which has resulted in the virtual universal granting of summary judgment to peer reviewers.[3] As a result, the HCQIA no longer provides *limited* immunity to peer reviewers, it provides *absolute* immunity.

The primary reason for the universal granting of summary judgment results from courts applying a standard of review that totally conflicts with the long standing decisions of this court. Specifically, in examining a peer review decision, courts uniformly look to the facts presented by the moving party and assess whether those facts are sufficient to find that the peer reviewer "reasonably ... concluded that their

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[3] The Tenth Circuit is the only circuit court of appeals that has upheld a lower court's finding that the presumption of immunity under HCQIA was rebutted by plaintiff. In *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324 (10th Cir. 1996), the court affirmed the district court's conclusion that Dr. Brown presented sufficient evidence for a reasonable jury to find that her peer review action was not taken after a "reasonable effort to obtain the facts of the matter" and, thus, defendants were not immune, as a matter of law, from damages stemming from the revocation of Dr. Brown's privileges. The analyses of both courts was focused on the third prong and did not address the nature of the "reasonable belief" test. The Tenth Circuit is also the only circuit which has not routinely adopted the "any evidence" standard. In one early district court case, HCQIA immunity was denied at summary judgment based on the hospital's failure to conform with the technical notice and fair hearing requirements. *See, Islami v. Covenant Medical Center, Inc.*, 822 F.Supp. 1361, 1377-78 (N.D.Iowa 1992)

actions would restrict incompetent behavior or would protect patients." *See* Appendix B at 49; *accord*, *Bryan v. James E. Holmes Reg. Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). The courts do not examine the evidence in a light most favorable to the physician to assess if the challenged decision could be viewed by a jury as unreasonable.

The standard of review applied by courts at the summary judgment stage of an HCQIA case is completely contrary to the long standing decisions of this court. Thus, this court should grant certiorari to address the HCQIA for the first time and correct the error that has obliterated the general standard of review and led to the universal granting of summary judgment to defendants in these cases.

A. The HCQIA "Any Evidence" Standard Is Totally Contrary to Long Standing Decisions of This Court.

It is well settled that when a court reviews a motion for summary judgment, it must view all evidence in a light most favorable to the opposing party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). The rule has been affirmed and uniformly applied by this court on multiple occasions. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); and *Matsushita Electric*

Industrial Company v. Zenith Radio Corporation, 477 U.S. 574, 599, 106 S.Ct. 1348, 1363, 89 L.Ed.2d 538 (1986).

The HCQIA, however, provides that there is a presumption of the correctness of the peer review decision. 28 U.S.C. § 11112(a). Thus, the issue arises as to how "the judge must view the evidence through the prism of the substantive evidentiary burden." *See Anderson, supra,* 106 U.S. at 2513, 106 S.Ct. at 254.

This issue was first addressed by the Ninth Circuit in *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992). followed by the Eleventh Circuit in *Bryan v. James E. Holmes Reg. Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994). With the exception of the Tenth Circuit, all other circuits have adopted with no discussion the standards articulated in *Austin* and *Bryan.*

In *Austin*, the Ninth Circuit noted that in order for HCQIA immunity to apply, the peer reviewer must be able to show that the professional review action complied with the four requirements set forth in § 11112(a), that is, that it was taken (1) in the reasonable belief that the action was in furtherance of quality healthcare; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures; and (4) in the reasonable belief that the action was warranted by the facts known to the reviewer. *Id.* at 733. Turning to the proper standard of review, the court found that the presumption in the statute created a "somewhat unusual standard" which the court described as follows:

> Might a reasonable jury, viewing the facts in the best light for [the physician], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of 11112(a)?

Id. at 734. Although the above statement of the standard of review provided lip service to the "most favorable" rule, neither the *Austin* court nor any court since has in fact applied that standard.

Turning to the legislative history of the statute, the court then described the alleged standard as follows:

> *[T]his test will be satisfied if the reviewers,* with the information available to them at the time of the professional review action, *would reasonably have concluded that their actions would restrict incompetent behavior.*

Id.

Then, in a statement which completely rejected the "most favorable" standard it had previously quoted, the court concluded: **"The real issue is the sufficiency of the basis for [the peer reviewer's] actions."** *Id.*,

Thus, in one fell swoop the court shifted the entire focus of the summary judgment standard to the peer reviewers, the information available to them and the

basis for their actions.

The *Austin* decision was followed shortly thereafter by the Eleventh Circuit decision in *Bryan v. James E. Holmes Reg. Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994). In *Bryan*, the named plaintiff physician lost his privileges after multiple failed efforts and warnings that he stop engaging in unprofessional and disruptive behavior. The Eleventh Circuit adopted both the *Austin* statement of the unusual standard of review and its commitment to focusing on the facts available the peer reviewers to support the reasonableness of their decisions. *Id.* at 1333-35. It did not at any point purport to view the physician's evidence in a light most favorable to him.

Since these two seminal cases, the courts have rendered additional rulings not only reinforcing the focus of review upon the peer reviewer's conduct, but virtually obliterating any need to even examine a physician's evidence. For example, courts have now concluded:

- HCQIA immunity is a question of law for the court to decide.
  - *Austin*, 979 F.2d at 734 & n. 5;
  - *Bryan*, 33 F.3d at 1332

- The standard for reviewing a peer review decision is an objective one; thus, evidence of bad faith or malicious peer review is irrelevant.
  - *Austin*, 979 F.2d at 734;
  - *Patrick v. Floyd Medical Center*, 255 Ga. App. 435, 440-41, 565 S.E.2d 491, 497

(2002)

- HCQIA does not require that the professional review action result in an actual improvement of quality healthcare, only that the peer reviewers reasonably believed it did.
  - *Imperial v. Suburban Hosp. Ass'n, Inc.* 37 F.3d 1026, 1030 (4th Cir. 1994)

- Summary suspension under the HCQIA only requires that danger *may* result if restraint is not imposed.
  - *Sugarbaker v. SSM Health Care* 190 F.3d 905, 917 (8th Cir. 1999);
  - *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1443 (9th Cir. 1994)

- HCQIA immunity is not affected by a hospital's failure to follow its own bylaws or other procedures in a peer review proceeding.
  - *Meyers v. Logan Mem'l Hosp.*, 82 F.Supp.2d 707, 715 (W.D. Ky. 2000), *aff'd*, 341 F.3d 461 (6th Cir. 2003);
  - *Peyton v. Johnson Med. Ctr.*, 101 S.W.3d 76, 87 (Tenn. Ct. App. 2002)

- Even if a physician shows that his peer reviewers reached an incorrect conclusion, such does not overcome the presumption of correctness of the peer reviewer's disciplinary action.
  - *Sugarbaker, supra,* 190 F.3d at 916;
  - *Brader v. Allegheny General Hospital,*

167 F.3d 832 (3d Cir. 1999);
- *Imperial, supra,* 37 F.3d at 1030.

- Even if a physician proves that his patient care met the standard of care, such does not overcome the presumption of the correctness of the peer reviewer's disciplinary action.
  - *Lee v. Trinity Lutheran Hospital,* 408 F.3d 1064 (8th Cir. 2004);
  - *Brader, supra,* 167 F.3d at 832;
  - *McLeay v. Bergan Mercy Health Sys. Corp.*, 714 N.W.2d 7 (Neb. 2006)

- Conflicting expert's testimony as to the care rendered by a physician does not call into question a peer review decision.
  - *Mathews v .Lancaster General Hosp.*, 87 F.3d 625, 636 & n.9 (3d Cir. 1996).

- The ultimate decision-maker need not investigate a matter independently; he need only make a reasonable effort to obtain the facts.
  - *Gabaldoni v. Washington County Hosp Ass'n,* 250 F.3d 255, 261 (4th Cir 2001).

- An investigation need only be conducted in a "sensible fashion;" it need not be flawless.
  - *Manzetti v. Mercy Hosp. of Pittsburgh,*565 Pa. 461, 776 A.2d 938 (2001).

Thus, as the standard of review now exists in an HCQIA case, a physician could provide evidence that

the peer review committee acted maliciously and in bad faith and used the peer review procedures to eliminate him from working in a community. He could prove that the peer reviewers mistakenly found that he had engaged in substandard care and that his patient care actually met the standard of care. He could show that the hospital violated its own bylaws and procedures in affording him a hearing. At the hearing, his experts could completely overwhelm the testimony of the hospital's experts. Following the due process hearing, the panel of physicians could rule in his favor finding that the peer reviewer's disciplinary action was arbitrary, capricious and not sustained by the evidence.

He could prove all of the above facts; yet, if the hospital could show that it went through all of the procedures and motions set forth in the HCQIA, that physician would have no cause of action against his peer reviewers. Because the standard now applied by courts makes all of the above facts irrelevant and because the court examines solely the peer reviewers' evidence to discern if there exists sufficient evidence to support the basis of the peer reviewers' decision, then the HCQIA now provides absolute immunity to peer reviewers.

B. The District Court Incorrectly Applied An "Any Evidence" Standard of Review In Granting Summary Judgment to Respondents In This Case

This case provides the most egregious example of a court ignoring the proper standard of review. Here, a

due process hearing panel of four physicians examined the exact same evidence as had originally been reviewed by the Medical Executive Committee and concluded to a preponderance of the evidence that the MEC's summary suspension was arbitrary, capricious and not sustained by the evidence.

If a panel of knowledgeable physicians could reach the conclusion that the MEC had failed to comply with the reasonableness provisions of the HCQIA, then it is axiomatic that a jury could reasonably reach the same conclusion. There would thus appear to be an issue of fact making summary judgment inappropriate.[4]

That is not what happened however. The district court completely ignored the findings of the due process hearing panel and looked only to the record evidence submitted by the Respondents to conclude that summary judgment was warranted. In its 125 page decision, not once did the district court purport

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[4] Respondents dispute this logic claiming that a finding of a hearing panel adverse to the peer review action is not a proxy which overcomes the presumption of correctness. To support their position, Respondents cite three cases: *Bryan, supra; Brader v. Allegheny General Hospital*, 167 F.3d 832 (3d Cir. 1999); and *Lee v. Trinity Lutheran Hospital*, 408 F.3d 1064 (8th Cir. 2004). These are the only other reported cases where a physician ever succeeded even minimally before a hearing panel. Because the peer review entities in the above cases all adopted the panel's recommendation favoring the physician, the reasonableness of the peer reviewers' decisions were not subject to question. The present case is the only case where a physician succeeded in his appeal to a hearing panel, but was completely rejected by the decision of the Board.

to examine the evidence from the standpoint of the Petitioner.

For example, in "analyzing" the MEC's decision to summarily suspend Petitioner's privileges, the court found that the evidence was sufficient to find that the MEC acted reasonably based solely upon the MEC's reviewing of two charts and its stating in its minutes that it believed "serious deficiencies" existed in Petitioner's treatment of two patients. App. B at 55-56.

The Court never examined Petitioner's evidence, which when viewed in a light most favorable to Petitioner, showed that there were legitimate explanations for Petitioner's patient care that completely refuted the MEC's conclusion that Petitioner might pose imminent danger to patients. Further, the evidence showed that the MEC had reviewed clearly incomplete charts, had based criticisms on information that had not been properly copied with the charts, had failed to learn valuable information about the cases by interviewing Petitioner, was not familiar with emergency medicine, and had ignored the peer reviews of the only ER physicians asked to provide input. Most significantly, the district court ignored that a panel of physicians reviewing the exact same evidence as the MEC had reviewed, concluded to a preponderance of the evidence that the MEC's decision was arbitrary, capricious and not sustained by the evidence.

A second example of the Court's ignoring the "most favorable" standard is reflected in the court's

assessment of whether the Board's action was taken "in the reasonable belief that the action was in further of quality healthcare." In finding for the Board, the court cited primarily to the Board's "findings" prepared by in-house counsel after their decision had been rendered. App. B at 59. In a rare reference to the hearing panel, the court stated that "Plaintiff also contends that the Hearing Committee recommended that Plaintiff's privileges be reinstated." *Id.* at 60.

Of course, the hearing panel went much further than merely recommend that Petitioner's privileges be reinstated. As noted above, the hearing panel found that the decision to summarily suspend Petitioner's privileges was arbitrary, capricious and unsupported by the evidence. Their finding amounted a finding that the MEC failed to comply with the HCQIA in concluding that Petitioner was a danger to his patients.[5] The court's description of the hearing panel decision unmistakably shows it failed to view the evidence in a light most favorable to Petitioner.

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[5] Under the hospital's bylaws and the standards adopted for the hearing, the Due Process Hearing Panel could not reverse the MEC unless it found "to a preponderance of the evidence" "that the recommendation that [the MEC] made that prompted th[e] hearing was ***arbitrary, capricious and not sustained by substantial evidence.***" V.4, R.106: Ex. 84 at 9; V. 4, R. 106, Ex. 14, Hospital Bylaws §11.21. The Panel ruled that there was no substantial evidence to support the MEC's conclusion that if they did not act, such "may result in an imminent danger to the health of another" Id., Hospital Bylaws §10.2.1. The "imminent danger" standard set forth in the hospital bylaws is identical to the standard required to comply with the HCQIA. Cf. HCQIA §11112(c). Thus, the Panel's ruling equated to a finding that the MEC had acted "outside the scope of the HCQIA."

The district court was thus able to essentially ignore the hearing panel's findings, just as the Board did.

Perhaps the two most striking examples of the district court's failure to view the evidence most favorably to the Petitioner are reflected in the court's assessment of whether the Board's decision was made in furtherance of quality healthcare and was reasonably based on the facts known to them.

As to the former, the court stated:

> Plaintiff also appears to contend that the Board erred *by rejecting his version of events as to the care that Plaintiff provided* to Mrs. C[redacted] and Mrs. H[redacted]. *Given the evidence in the record, however, the Board reasonably could have chosen to reject Plaintiff's testimony or to find that testimony not credible.* This argument thus fails to show that the Board's decision to uphold Plaintiff's suspension was not taken "in the reasonable belief that the action was in furtherance of quality health care."

As to the latter, the court stated:

> Plaintiff cannot rebut the presumption that the Board made its decision "in the reasonable belief that the action was warranted by the facts known" *based on his contention that the Board improperly rejected his version of the facts.*

App. B at 70. If the court had indeed reviewed the evidence in a light most favorable to the non-movant, then it necessarily would have had to take into account Petitioner's "version of the facts." Viewing the evidence most favorably to the Petitioner, the court was supposed to assume that all evidence and any reasonable inferences to be drawn therefrom favored Petitioner. Armed with that view of the facts, the court should have assessed whether a reasonable jury could have found that the Board did not have a reasonable belief as to its actions. As the above statements make abundantly clear, the court was uninterested in the "version of the facts" from Petitioner's viewpoint.

In short, at every stage of its analysis, the district court was concerned only with whether sufficient facts had been presented by Respondents to support the reasonableness of the MEC's and Board's decision. The district court opinion evidences that it applied an "any evidence" standard in granting summary judgment to Respondents. Respondents counsel conceded the same at oral argument before the Eleventh Circuit panel.

It was error for the district court, and it is error for every other court, to apply an "any evidence" standard of review at the summary judgment stage of a case.

C. Unlike the HCQIA "Any Evidence" Standard, Other Federal Statutes Having Higher Substantive Evidentiary Burdens Still Allow For Reviewing the Evidence In a Light Most

Favorable to the Non-Movant.

As is noted above, the HCQIA "any evidence" standard is a product of the *Austin* court's failed attempt to mesh the statute's presumption of correctness with the traditional "most favorable" standard. There are analogous situations involving other areas of the law where the higher evidentiary burden has not eliminated the "most favorable" standard.

One such area involves the "clear and convincing" evidence requirement to prove "actual malice" in a defamation action under the *New York Times* doctrine. In *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986), this court held that a higher evidentiary burden should be recognized by a court in ruling on a motion for summary judgment. *Id.* at 254. This court expressly noted, however, that the higher burden did not "denigrate the role of the jury" and that "[t[he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 255.

In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419, _ L.Ed.2d _ (1991), this court examined the higher evidentiary burden of *New York Times*, then promptly examined the facts in a light most favorable to the non-movant to that evidentiary standard. The higher evidentiary burden did not require the adoption of an "any evidence" standard.

The superimposition of important facts from the present case into the scenario presented in *Anderson* crystallizes the fundamental defect in the HCQIA "any evidence" standard. In *Anderson*, a plaintiff non-profit corporation brought suit against a magazine publisher for defamation arising from an article published regarding the plaintiff. The publisher filed for summary judgment claiming that plaintiff could not overcome the "clear and convincing" burden required to show "actual malice" because the writer of the story submitted an affidavit setting forth in detail the research he had done on the story and the wide variety of resources he had relied upon.

The district court granted summary judgment, but the D.C. Circuit reversed finding that with respect to certain statements, a jury could find to a preponderance of the evidence that the publisher acted with actual malice. It ignored the higher evidentiary burden applicable at trial.

The Supreme Court granted certiorari and reversed finding that in evaluating summary judgment, a court must consider the evidentiary burden to assess whether genuine issues of disputed facts exist requiring a jury's resolution. The court then remanded the case to the D.C. Circuit to reconsider using the appropriate standard.

Let us now superimpose the major facts of this case onto the *Anderson* facts. Let us assume that once the plaintiff complained of the alleged defamatory publication, a federal statute provided that he had

the right to have his claim of actual malice considered by a panel of First Amendment lawyers appointed by the publisher. Let us further assume that at the conclusion of any hearing, the panel concluded that in fact, the publisher had acted with "actual malice." Even though the panel's decision was non-binding, is there any doubt whatsoever that such a finding would raise a sufficient issue of fact so as to require a jury to resolve that issue?

That is precisely the scenario presented in this case. The panel decision, together with all the other evidence viewed favorably to Petitioner (*see* page 18, *supra*), established that a jury, just like the hearing panel, could reasonably conclude to a preponderance of the evidence that Respondents had failed to act consistent with the reasonableness requirements of the HCQIA.

Importantly, the denial of summary judgment would not mean that Respondents lost their immunity under the HCQIA, it would merely mean that subsidiary issues of fact regarding the reasonableness of their conduct would have to be submitted to a jury before the immunity issue could be finally resolved.

D. There Are Compelling and Important Reasons For This Court to Grant the Petition for Writ of *Certiorari*

The HCQIA has been in effect for 20 years, during which time hundreds of cases have been decided all in the form of summary judgment granted to the peer

review entities. A body of law has engulfed the statute transforming its limited immunity into absolute immunity for peer reviewers. Moreover, as illustrated by the present case, the "any evidence" standard of review that has developed rejects the "most favorable" standard of review and turns well established precedent of this court upside down.

Certiorari is appropriate when precedential decisions of the appellate courts as to the construction and interpretation of a federal statute might seriously hinder future administration of the statute. *See Fed. Trade Comm'n v. Am. Tobacco Co.*, 274 U.S. 543 (1927) (finding serious hindrance of future administration of the law was grave and sufficiently probable to justify issuance of writ, but ultimately controversy over FTC cease and desist order turned on a previously decided fact issue of no general importance). The Court also has power to review the correctness of judicial application of an evidentiary standard in the rare instance when the standard appears to have been misapprehended or grossly misapplied. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-91 (1951) (correcting variant applications of the "substantial evidence" standard for reviewing evidentiary validity of NLRB findings and redefining the scope of judicial review of administrative actions). The gross misapplication of the HCQIA in summary judgment cases requires intervention by this court.

Not surprisingly, requests that *certiorari* be granted to address the HCQIA now routinely come before the

court.[6] No doubt this is due to the swing in the pendulum that has occurred with ever increasing concerns being voiced over sham peer review.

In recent years, major newspapers have written about "sham" and "retaliatory" hospital peer review against physicians. For example, in 2003, the Pittsburgh Post-Gazette explored the subject in a four-day series of articles.[7] Medical journals have editorialized about "Sham Peer Review and the Courts."[8] There are multiple national organizations devoted to publicizing peer review injustice.[9]

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[6] *See, e.g., Poliner v. Texas Health Systems*, 537 F.3d 368 (5th Cir. 2008), *cert. denied*, ___ U.S. ___ 129 S.Ct. 1002, 173 L.Ed.2d 315 (2009); *Cowett v. TCH-Pediatrics, Inc.* 2006 WL 2846282 (Ohio 2006), *cert. denied*, ___ U.S. ___, 128 S.Ct. 115, 169 L.Ed.2d 244 (2007); *Joshi v. St. Luke's Presbyterian-Episcopalian Hospital, Inc.*, 142 S.W.3d 862 (Mo. App. 2004), *cert. denied*, 544 U.S. 922, 125 S.Ct. 1646, 161 L.Ed.2d 479 (2005); *Angelico v. Lehigh Valley Hosp., Inc.*, 543 U.S. 814, 125 S.Ct. 67, 160 L.Ed.2d 19 (*cert. denied* Oct. 4, 2004).

[7] *See* Steve Twedt, *The Cost of Courage - Four Part Series*, Pittsburgh Post-Gazette, October 26, 2003 - October 29, 2003, *available at* http:// www.post-gazette.com/pg/03299/234499.stm (last visited May 23, 2007).

[8] Lawrence R. Huntoon, M.D., Ph.D., *Sham Peer Review and the Courts*, Journal of American Physicians & Surgeons, Volume 11, No. 1, Spring 2006, at 4-5, *available at* http://www.jpands.org//vol11no1/huntoon.pdf (last visited May 23, 2007).

[9] *See, e.g.*, The Semmelweis Society International, http:// www.semmelweis.org and http://www.SemmelweisSociety.net (last visited May 23, 2007); American Association of Physicians & Surgeons, Inc., http:// www.aapsonline.org (last visited May 23, 2007); The Center for Peer Review Related Justice, http://www.peerreview.org (last visited May 23, 2007).

Unless and until this court accepts an HCQIA case, there will continue to be abuse of hospital peer review for political or economic purposes. Such threatens the quality of medicine, and increasingly goes unremedied and undeterred, because courts have transformed HCQIA's qualified immunity into a *de facto* absolute immunity.

Finally, this case is perhaps the best case possible for this court to examine the HCQIA. This case squarely raises the issue of the interpretation and application of the "most favorable" versus "any evidence" standards of review. This is the only reported case where hearing panel found squarely in favor of the physician, evaluating the same criteria in its decision that a court must apply under the HCQIA in assessing whether to grant summary judgment. If the facts of this case do not warrant denial of summary judgment, then there is no case where such is required.

Conclusion

The Court should grant a writ of certiorari in this case to correct the gross misapplication of the summary judgment standard of review in HCQIA cases and to provide the courts and medical profession with much needed guidance on the application, interpretation and parameters of the HCQIA.

[signatures next page]

Respectfully submitted this 23rd day of June, 2009.

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Certificate of Compliance

No. 09-_____

G[redacted] A. M[redacted], M.D., *Petitioner*

v.

A[redacted] H[redacted] S[redacted] / G[redacted] Inc.,
d/b/a G[redacted] Hospital,
A[redacted] H[redacted] S[redacted] S[redacted] H[redacted] S[redacted]
C[redacted] J[redacted], Chief Executive Officer,
G[redacted] Hospital,
B[redacted] B[redacted], M.D., P[redacted] G[redacted], M.D., and
R[redacted] M[redacted], *Respondents.*

As required by Supreme Court Rule 33.1(h). I certify that this petition for a writ of certiorari contains **6,895** words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 23, 2009.

David F. Guldenschuh